IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00931 COA

KEITH HILL A/K/A KEITH LATRELL HILL AND DEMOND RODRAGUES JACKSON — **APPELLANTS**

v.

STATE OF MISSISSIPPI — **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	08/28/95
TRIAL JUDGE:	HON. GEORGE C. CARLSON JR.
COURT FROM WHICH APPEALED:	TATE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	DAVID L. WALKER
	JOHN D. WEDDLE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: W. GLENN WATTS
DISTRICT ATTORNEY:	ROBERT L. WILLIAMS
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CT I THRU CT V DRIVE BY SHOOTING: HILL & JACKSON; EACH: CT I AND CT II 30 YRS WITH 10 YRS SUSPENDED; SENTENCES RUN CONCURRENTLY; CTS III, IV, V 30 YRS WITH 30 YRS SUSPENDED; SENTENCES RUN CONSECUTIVELY TO CT II; PAY ALL COSTS OF COURT
DISPOSITION:	AFFIRMED - 11/04/97
MOTION FOR REHEARING FILED:	11/19/97
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

KING, J., FOR THE COURT:

Demond Rodragues Jackson and Keith Latrell Hill were each convicted on five counts of driveby

shooting in the Circuit Court of Tate County. Aggrieved, Jackson and Hill appeal to this Court. Jackson and Hill allege the following identical assignments of errors:

> I. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANTS' REQUEST FOR LESSER INCLUDED OFFENSE INSTRUCTIONS OF AGGRAVATED ASSAULT AND SIMPLE ASSAULT.
>
> II. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANTS' MOTION TO DISMISS COUNTS 1, 2, 3, 4, AND 5 OF THE INDICTMENT ON THE GROUND THAT THE Driveby SHOOTING STATUTE, § 97-3-109 MISS. CODE ANN. (SUPP. 1994) IS UNCONSTITUTIONALLY VAGUE.
>
> III. WHETHER THE VERDICT OF THE JURY IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.
>
> IV. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANTS' PEREMPTORY INSTRUCTION OF NOT GUILTY.
>
> V. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANTS' MOTION FOR ACQUITTAL AFTER THE APPELLEE RESTED ITS CASE-IN-CHIEF WITH RESPECT TO COUNTS 2, 3, 4, AND 5 OF THE INDICTMENT.

FACTS

On October 24, 1994, as Terry Lewis and Arron Sipp were backing out of the drive way of Erma Renfro's house, Tracy Jackson walked up to the car and told Lewis that some guys in a passing car were harassing him. Lewis told Tracy Jackson to get in the car, and he would take him home. Just as Tracy Jackson was about to get into the car, a gray Pontiac Grand Am pulled up behind Lewis' car and two of the passengers began shooting. Lewis, Jackson, and Sipp ducked, but a bullet struck Lewis in the back of the neck. Thelma Renfro, Erma Renfro's daughter, was in the front yard but ran into the house during the gunfire. Several bullets struck Lewis' car and at least one bullet entered Erma Renfro's house and bounced off of the walls. Erma Renfro was inside of the house with two small children.

Subsequently, Lewis and Tracy Jackson identified Demond Rodragues Jackson, Jerome Leverson, and Theopaulus Alexander as three of the four men in the Grand Am from which the shots were fired. Leverson and Alexander identified Keith Latrell Hill as the fourth man in the car. The four were indicted and charged with five counts of driveby shooting in violation of § 97-3-109 of the Mississippi Code Annotated and one count of shooting into an occupied dwelling in violation of § 97-37-29 of Mississippi Code Annotated. Leverson and Alexander entered into plea agreements and pled guilty to accessories after the fact. Demond Jackson and Keith Hill went to trial and were convicted on each of the five counts of driveby shooting. Jackson and Hill were sentenced to serve thirty years on count one, with ten years suspended pending future good behavior; thirty years on count two, with ten years suspended pending good behavior, to be served concurrently with the sentence of count one; thirty years suspended on counts three thru five pending future good behavior, to be served consecutively.

Because both defendant's assignments of error are identical, as are their briefs, we will address the issues collectively.

> I. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S REQUESTS FOR LESSER INCLUDED OFFENSE INSTRUCTIONS OF AGGRAVATED ASSAULT AND SIMPLE ASSAULT.

Based on the evidence presented, if the jury could find Jackson and Hill not guilty of driveby shooting, but guilty of the lesser-included offenses of aggravated assault or simple assault, a lesser-included offense instruction was warranted. *Toliver v. State*, 600 So. 2d 186, 192 (Miss. 1992); *Fairchild v. State*, 459 So. 2d 793 (Miss. 1984). Where Jackson and Hill requested that the jury be instructed on a lesser charge, this Court will look at the evidence in the light most favorable to the Defendants in determining whether such was warranted. *Taylor v. State*, 577 So. 2d 381, 383 (Miss. 1991).

Jackson and Hill were charged with driveby shooting in violation of Section 97-3-109 of the Mississippi Code Annotated (Rev. 1994):

> (1) A person is guilty of driveby shooting if he attempts, other than for lawful self-defense, to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life by discharging a firearm while in or on a vehicle and, upon conviction, he shall be punished by commitment to the custody of the State Department of Corrections for a term not to exceed thirty (30) years . . . .

The evidence presented at trial demonstrated that Jackson and Hill were riding in a vehicle and both fired several shots from the window at Tracy Jackson and into another vehicle driven by Terry Lewis. At least one bullet entered the home of Erma Renfro, where she and two small children lay on the floor to escape injury. Such purposeful, knowing, and reckless action by Demond Jackson and Keith Hill satisfied the requirements of Section 97-3-109. Under these circumstances, lesser-included instructions were not warranted because a reasonable jury could not have found Jackson and Hill not guilty of the principal offense of driveby shooting. Thus, we find no merit in this assignment of error for either Defendant.

> II. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANTS' MOTION TO DISMISS COUNTS 1, 2, 3, 4, AND 5 OF THE INDICTMENT ON THE GROUND THAT THE Driveby SHOOTING STATUTE, SECTION 97-3-109 OF THE MISSISSIPPI CODE ANNOTATED IS UNCONSTITUTIONALLY VAGUE.

Jackson and Hill contend that Section 97-3-109 is unconstitutionally vague and therefore void because it does not clearly define the term "driveby shooting." We disagree.

The Mississippi Supreme Court has held that the test for determining whether a statute is unconstitutionally vague is: whether the statute either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, and warning as to the proscribed conduct. *Meeks v. Tallahatchie County*, 513 So. 2d 563, 566 (Miss. 1987); *Cassibry v. State*, 404 So. 2d 1360, 1367-68 (Miss. 1981). In the present

case, the language of Section 97-3-109 sets out the proscribed conduct and actions with clarity that can be understood by even those of modest intelligence. A determination of whether the car in which Jackson and Hill rode was moving when they opened fire upon their victims was unnecessary for one to determine or recognize the conduct criminally proscribed by the statute. We find no merit in this argument.

> III. WHETHER THE VERDICT OF THE JURY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.
>
> IV. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANTS' PEREMPTORY INSTRUCTION OF NOT GUILTY.
>
> V. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANTS' MOTION FOR ACQUITTAL AFTER THE APPELLEE RESTED ITS CASE-IN-CHIEF WITH RESPECT TO COUNTS 2, 3, 4, AND 5 OF THE INDICTMENT.

In their three remaining assignments of error, Jackson and Hill contend that the trial court erred by denying their motions for a directed verdict of aquittal, a peremptory instruction of not guilty, and for a new trial. Our standards of review for such assignments of error are limited. We review motions for directed verdict and peremptory instruction under a sufficiency of the evidence standard:

> We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. The evidence and inferences so considered, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond-a-reasonable-doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, we may not disturb the verdict.

McClain v. State, 625 So. 2d 774, 778 (Miss. 1993); *McGee v. State*, 569 So. 2d 1191, 1194 (Miss. 1990).

According to the State's witnesses, Jackson and Hill fired several gunshots from the window of the car. The testimony did not reveal that Jackson's and Hill's actions were taken in self-defense. After the State rested its case-in-chief, Jackson and Hill moved for an aquittal, which the trial court denied. Having viewed the evidence in the light most favorable to the prosecution and considering all inferences, we find that the trial court was correct in its determination.

Finally, Jackson's and Hill's contention that the judgment was against the overwhelming weight of the evidence is without merit. We will not reverse the jury findings unless the verdict was so contrary to the overwhelming weight of the evidence that it would be unconscionable to allow it to stand. *Benson v. State*, 551 So. 2d 188, 193 (Miss. 1989). We find that the verdict is supported by the evidence, therefore, we affirm the trial court's judgment.

THE JUDGMENT OF THE CIRCUIT COURT OF TATE COUNTY OF CONVICTION OF DEMOND RODRAGUES JACKSON OF DRIVEBY SHOOTING IN COUNTS I AND II AND SENTENCE OF THIRTY YEARS ON EACH COUNT AND TEN YEARS SUSPENDED ON

EACH COUNT TO BE SERVED CONCURRENTLY AND SENTENCE OF THIRTY YEARS EACH ON COUNTS III, IV, AND V WITH THIRTY YEARS SUSPENDED ON EACH COUNT PENDING FUTURE GOOD BEHAVIOR TO RUN CONSECUTIVE TO PREVIOUS SENTENCES, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANT.

THE JUDGMENT OF THE CIRCUIT COURT OF TATE COUNTY OF CONVICTION OF KEITH LATRELL HILL OF DRIVEBY SHOOTING IN COUNTS I AND II AND SENTENCE OF THIRTY YEARS ON EACH COUNT AND TEN YEARS SUSPENDED ON EACH COUNT TO BE SERVED CONCURRENTLY AND SENTENCE OF THIRTY YEARS EACH ON COUNTS III, IV, AND V WITH THIRTY YEARS SUSPENDED ON EACH COUNT PENDING FUTURE GOOD BEHAVIOR TO RUN CONSECUTIVE TO PREVIOUS SENTENCES, ALL IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.